



# THE COMMITTEE ON ENERGY AND COMMERCE

## INTERNAL MEMORANDUM

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October 3, 2011

To: Members of the Subcommittee on Commerce, Manufacturing, and Trade

From: Majority Committee Staff

Re: Hearing on “Protecting Children’s Privacy in an Electronic World”

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### I. Summary

On Wednesday, October 5, 2011, the Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing entitled “Protecting Children’s Privacy in an Electronic World” at 9:00 a.m. in room 2123 of the Rayburn House Office Building. Witnesses are by invitation only.

The purpose of this hearing is to examine existing protections for children’s online privacy and their adequacy in an increasingly electronic and mobile world. In particular, the Subcommittee will examine the provisions of the Children’s Online Privacy Protection Act (COPPA)<sup>1</sup> and the Federal Trade Commission’s recent proposal to revise its COPPA rule.<sup>2</sup>

### II. Witnesses

Six witnesses will testify before the Subcommittee:

*Mary Koelbel Engle*  
Associate Director  
Division of Advertising Practices  
Federal Trade Commission

*Hemanshu Nigam*  
Founder and Chief Executive officer  
SSP Blue

*Morgan Reed*  
Executive Director  
Association for Competitive Technology

*Stephen Balkam*  
Chief Executive Officer  
Family Online Safety Institute

*Dr. Kathryn Montgomery*  
Director, Ph.D. Program  
School of Communication  
The American University

*Alan Simpson*  
Vice President of Policy  
Common Sense Media

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<sup>1</sup> 15 U.S.C. §§ 6501 – 6506.

<sup>2</sup> 76 Fed. Reg. 59804 (Sept. 27, 2011). The rule is codified at 16 C.F.R. Part 312.

### **III. Background**

The legal framework for the protection of children's Internet privacy is the Children's Online Privacy Protection Act (COPPA). Enacted in 1998, COPPA prohibits, without parental consent, the collection of personal information from a child under the age of 13 by a commercial website directed to children. Websites not targeted at children are also prohibited from collecting personal information from a user if they have actual knowledge that the user is a child under 13 and they do not have parental consent. COPPA prohibits websites from conditioning game use on the provision of information and mandates that collected information be protected by reasonable safeguards. For websites that do collect the personal information of children, the statute requires that they do so with "verifiable parental consent" and that such sites provide notice on the site of what information is collected, used or disclosed. Finally, the Act establishes a safe harbor regime for deemed compliance with the Federal Trade Commission's regulations promulgated under the Act.<sup>3</sup>

In April 2010, the FTC initiated a review of the COPPA rule, seeking comments on whether the state of the Internet and technology warranted changes. In three major areas, the FTC determined no change was necessary: the age threshold; the "actual knowledge" standard as applied to websites that are not targeted toward children; and the definitions of "internet" and "online services."<sup>4</sup> The FTC proposes changes to five other areas: definitions; notice regarding collection, use, and sharing of information; verifiable parental consent mechanisms; confidentiality and data security; and, FTC review of the Safe Harbor programs. The FTC also proposes the addition of a data retention and deletion provision.

### **IV. Proposed Changes to the FTC's COPPA Rule**

While the FTC proposes a number of changes to the existing COPPA rule, the most significant changes are to the definitions, the parental consent provisions, the addition of a data retention standard, and the oversight of safe harbors.

#### *A. Definitions*

The FTC proposes to revise the definition of "collects or collection" so as to include not only circumstances when a website operator directly requests the submission of personal information, but also when it merely prompts or encourages such submission. The proposal would also replace the "100% deletion standard" with a more flexible standard under which website operators will not be considered to have collected personal information if they employ "reasonable measures" to delete personal information. The purpose of this change is to encourage innovation in filtering technologies to detect and delete personal information before

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<sup>3</sup> There are currently four FTC-approved Safe Harbor programs.

<sup>4</sup> The FTC determined the existing definition of "internet" is technology-neutral and thus applicable to mobile devices, while the existing definition of "online services" is broad enough to cover those services that are not strictly websites but that access the Internet.

its public posting, particularly in interactive services. The proposal would also clarify that any method of passive online tracking, regardless of specific technology, qualifies as information collection.

In recognition of new interactive technologies, the FTC intends to expand the definition of “online contact information” from an email address or substantially similar identifier to include all identifiers that would permit direct online contact (e.g., instant messenger screen names, VOIP identifiers, or video chat user names).

The statute defines “personal information” as a first and last name; a home or other physical address; an email address; a telephone number; a Social Security number; information about the child or his or her parents, in combination with another of these elements; and any other identifier the FTC determines. Using that latter authority, the FTC proposes to expand the statutory definition of “personal information” to include the identifiers captured by its proposed definition of “online contact information.” The FTC also proposes the inclusion of screen names and usernames; persistent identifiers such as an IP address or device serial number; and an identifier that links activities across websites (e.g., a passport).<sup>5,6</sup> The proposal would further define videos and audio files that capture a child’s image or voice and geolocation data as personal information, requiring parental consent before collecting or permitting a child to post online.

The FTC currently determines whether a website is directed toward children based on a totality analysis. The proposal would expand the factors to be considered by including musical content, child celebrities, and other celebrities that appeal to children under 13 years of age.

#### *B. Parental Consent*

COPPA requires verifiable parental consent before website operators may collect personal information from children. The COPPA rule enumerates those methods by which operators may obtain acceptable verifiable consent. Recognizing the evolution of technology, the FTC’s proposal would permit flexibility in the consent mechanism regime to encourage innovation in consent mechanisms and the development of more reliable consent tools. In the most significant change to this section, the proposal would address the growing unreliability of the so-called “email plus” method by eliminating it as a method of parental consent. Recognizing that this amendment would affect many operators, the FTC proposes a new process permitting operators to submit to the FTC for approval new methods for parental consent. Additionally, the FTC proposes that in lieu of such pre-approval, Commission-approved safe harbors may adopt new consent mechanisms if the organization believes the mechanism meets the requirements of the COPPA rule.

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<sup>5</sup> When these identifiers are used only within a site and used only for functions supporting the website, the collection of these identifiers would be permissible without parental consent.

<sup>6</sup> This limitation would directly affect the ability of advertising networks to track a child’s behavior on the Internet and deliver advertising accordingly.

*C. Data Retention and Deletion Requirements*

The FTC proposes adding a new provision to the COPPA rule governing data retention and deletion of children's personal information. The provision would require operators to delete such information when the operator no longer needs it to fulfill the purpose for which it was first collected.

*D. Safe Harbors*

The FTC proposes a new self-audit requirement on approved safe harbor programs under which its members' information practices would be reviewed annually. Any new safe harbor program applicant would be required to include with its application to the FTC a description of its capability to perform such annual member audits. Additionally, all safe harbor programs would be required to regularly submit (every 18 months) to the FTC the results of their annual member audits and any disciplinary actions imposed on their members.

**V. Issues for Discussion**

- What tools are available to parents to protect their children's privacy online?
- Does Congress need to revisit COPPA in light of the technological advances since its enactment in 1998?
- Is the current age threshold (under 13 years of age) the appropriate threshold to protect minors online?
- What are the constitutional and technological implications of raising the COPPA age threshold above 13?
- To what extent are the privacy protections mandated for children under 13 appropriate privacy protection for individuals of all ages?
- Will the proposed expansion of the factors used in determining whether a website is targeted to the COPPA-protected population lead to a *de facto* increase in the COPPA age threshold?
- Is the COPPA Safe Harbor regime an effective self-regulatory model? Could it be successfully utilized in other privacy contexts?
- Is the expansion of the definition of personal information in the COPPA rule appropriate for use as a precedent in the broader online privacy context?

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Please contact Brian McCullough, Gib Mullan, or Shannon Weinberg at 5-2927 with any questions.